IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2969 OF 2006

Ravi P.Agarwal & Ors. .. Appellants.
Vs.
The Municipal Corporation
of Greater Bombay & Anr. .. Respondents.

Mr.A.Y.Sakhare i/b Little & Co. for the appellants.
Mr.J.J.Xavier for the respondent-corporation.

CORAM : D.B.BHOSALE, J.
DATED : 20TH DECEMBER, 2006

P.C.:

. Heard learned counsel for the parties.

2. Admit.

3. By consent of the learned counsel for the parties taken up for final hearing forthwith. The parties have placed the entire material on record. With the assistance of learned counsel for the parties I have perused the impugned judgment and other material placed before me.

4. This appeal is directed against the judgment and order dated 16.8.2006 passed by the City Civil Court in L.C. Suit No.5338 of 2001. The subject matter of the suit was a notice issued under section 351 of the Bombay Municipal Corporation Act, dated 27.8.2001 and the order passed in pursuance thereof by the Assistant Municipal Commissioner, (West) Ward office, Municipal Corporation dated 3rd October, 2001.

5. The trial Court framed the following issues:

> "1. Whether plaintiff proves that alleged unauthorised extension to the Bungalow on the rear side with brick masonary walls and AC Sheet roof admeasuring 34ft X 14ft and the shade on the terrace admeasuring 12ft. 6 inches X 18ft. 9 inches with fibre glass roof admeasuring 14ft.4 inches X 19ft X 9 inches and other unauthorised work as shown in the sketch Exh.D, page 83 are authorised construction ? In the negative.
>
> 2. As per the finding of issue no.1, whether notice dated 27.1.01 and order dated 3.10.01 are bad in law ? In the negative.
>
> 3. What order ?" As per final order.

6. After the issues were framed it appears that the affidavits in examination in chief were also filed on behalf of the appellants. When the matter riped for hearing it transpired that the appellant's proposal for regularisation of the disputed structure made on 26.12.2000 was still pending and in view thereof in paragraphs 12 of the impugned judgment the following objections were made:

> "12. It so happened thereafter that before proceedings further with the recording of evidence of PWI - Plaintiff, Ld.Adv. Mr.Bafna for the plaintiffs submitted before this court that the plaintiff has already submitted regularization proposal in respect of the additions and alterations made by the plaintiff, which is more particularly, covered under the suit notice, vide regularisation Proposal dated 26th December, 2000."

7. It further appears that the regularisation

proposal submitted by the appellants was kept in abeyance by the Executive Engineer (Building and Proposal) (for short "EEBP") till the policy of allowing TDR in CRZ-II was decided on receipt of the guideline. The observations in respect thereof as reflected in paragraph 15 to 18 read thus:

> "15. On the plain reading of the aforesaid letter dated 3.2.2001, issued by the EEBP, it clearly goes to show that regularization proposal submitted by the Plaintiff on 26th December, 2000 in respect of unauthorised extension on the ground floor and the first floor and above it on first floor adm.55.00 sq.mts. is kept in abeyance till the policy of allowing TDR in CRZ-II is decided and on receipt of the guidelines, same will have to be regularised by counting the said unauthorized area in FSI by purchasing TDR to that extent.
>
> 16. It is also observed in the said letter dated 3.2.2001, issued by the EEBP that as regards tenantable repairs in the authorised portion of the existing structure, such as plastering change of flooring, water proofing etc. it does not require permission from this office, subject to payment of Rs.5000/- towards debris deposit.
>
> 17. The Plaintiff having drawn the attention of the Court that the said regularization proposal is kept in "abeyance" goes to suggest, indirectly, the Plaintiff admitted before this Court that whatever allegations made by the corporation regarding unauthorized construction referred therein, are correct. No prudent person is expected to go for regularization, unless he or she admits that construction mentioned in the schedule of the suit notice is unauthorized and, therefore, he or she proposes to get it regularised by submitting necessary regularization application.
>
> 18. If this is the position and the EEBP having kept the regularization application of the Plaintiff in "abeyance", it is absolutely of no use to continue with this suit. In other words, Regularisation Application is not

> finally decided by the competent authority. The only appropriate order, which I find fit in this suit, is to direct the EEBP to pass an order either regularizing the unauthorized work or rejecting it, if there is no policy of allowing TDR in CRZ-II, is approved as AS ON TODAY. in case if, the EEBP wants to keep the proposal in "abeyance", for further indefinite period, in that event, in the interest of justice, the interim relief granted by this Court is required to be continued till the policy of allowing TDR in CRZ-II is decided."

8. After making the observations as reflected in paragraph 18 the learned Judge proceeded to decide the matter on merits and answered all the issues in negative. It is clear from the observations made in the aforestated paragraphs that the matter was not heard on merits. The parties were not allowed to lead evidence and examine the witnesses in support of their rival claims before the Court. It is true that there is a scope to draw an inference in view of the fact that the proposal for regularisation of the structure in dispute was made by the appellants, but the course adopted by the learned Judge was wrong. If the learned Judge had felt it necessary to direct the EEBP to consider the proposal seeking regularisation of the disputed structures within the time frame, he ought to have had awaited its decision and then proceeded to hear the suit on merits. In any case, he was wrong in addressing the issues on merits and answering them in negative without allowing the parties to lead all the evidence, as they desired, in support of their case. As a matter of fact, this being a suit challenging the

notice under section 351 of the B.M.C.Act, there was no reason for the learned Judge to give directions to EEBP, as reflected in the operative part of the order, and should have proceeded to decide the suit on merits. I fail to understand that after making observations, as reflected in paragraph 12 and 14 to 18, why the learned Judge proceeded to record his findings on all issues in negative without recording the evidence and allowing the parties to prove their case. It is against this backdrop the learned counsel for the parties fairly stated that the impugned judgment may be set aside and the matter may be remanded to the trial Court to decide it afresh on merits without awaiting decision of the EEBP on the proposal filed by the appellants seeking regularisation or till the Government frame its new policy allowing TDR in CRZ-II. In the circumstances I pass the following order:

(i) The impugned judgment is quashed and set aside.No costs.

(ii) The trial Court shall decide the suit afresh after allowing the parties to lead all the evidence, as they desire, and examine the witnesses in support of their rival claims. The trial Court shall also allow the respondent-corporation to file their written

statement within six weeks from today.

(iii) The trial Court shall decide the suit on merits in accordance with law and without entering into an issue of regularisation, as expeditiously as possible and in any case within six months from today.

(iv) The parties are directed to appear before the trial Court on 15th January, 2007. The learned Judge shall decide the suit within the time stipulated by this order.

(v) The interim protection granted to the disputed structure vide order dated 18th August, 2004 passed in Notice of Motion No.4460 of 2001 in L.C.Suit No.5338 of 2001 shall remain in force till the disposal of this suit. The parties are directed to co-operate disposal of the suit within the time stipulated and shall preclude from seeking adjournments on frivolous grounds.

(D.B.Bhosale, J.)